

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs September 22, 2009

**STATE OF TENNESSEE v. JOSHUA ALLEN HUTTON**

**Direct Appeal from the Circuit Court for Blount County**  
**Nos. C-17396-99, C-17400, & C-17422   Jon Kerry Blackwood, Judge**

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**No. E2009-00857-CCA-R3-CD - Filed December 29, 2009**

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The Defendant pled guilty to driving on a revoked license, possession of an altered government issued ID, fraudulent use of a credit card, theft of property over \$500, theft of property under \$500, two counts of forgery, and two counts of identity theft, and he agreed to a four-year sentence, with the trial court to determine the manner of service of the sentence. The trial court ordered the Defendant's sentence to be served in the Tennessee Department of Correction, and it is from this judgment that the Defendant now appeals, asserting the trial court should have imposed an alternative sentence. After a thorough review of the record and relevant authorities, we conclude the trial court did not err when it imposed incarceration. As such, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., J.J., joined.

Mack Garner (at trial), Maryville, Tennessee; and J. Liddell Kirk (on appeal), Knoxville, Tennessee, for the Appellant, Joshua Allen Hutton.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Deshea Dulany Faughn, Assistant Attorney General; Michael L. Flynn, District Attorney General; Tammy Harrington, Assistant District Attorney General, for the Appellee, State of Tennessee.

**OPINION**

**I. Facts**

The Defendant committed the crimes in this case while serving a three-year probated sentence for three 2007 forgery convictions in Blount County. When the Defendant pled guilty in this case, he agreed to serve a four-year sentence consecutively to his previous three-year sentence. The trial court conducted a hearing to determine not only the manner in which the Defendant would serve his four-year sentence in this case but also the manner in which he would serve the remainder

of his previous three-year probated sentence. At the sentencing hearing, the State introduced a presentence report, which indicated that the Defendant was twenty-four at the time of the hearing and was the father of a two-year-old daughter. According to the report, the Defendant was committed to the Department of Children's Services as a teenager, and after he was released at age eighteen, he committed numerous crimes, including forgery, vandalism, domestic violence, resisting arrest, driving with a revoked license, theft, public intoxication, cocaine possession, and assault. The Defendant attended Tennessee Technology School for one year and obtained a certificate of completion for commercial cleaning. He reported sporadic employment in the construction and restaurant industries between 2007 and 2008. The Defendant acknowledged abusing alcohol and consuming illegal drugs and stated that he committed the crimes in this case to support his drug habit.

The report included statements from the Defendant's grandmother, who adopted him when he was an infant, and his ex-girlfriend, Emily Boldick. Both women said the Defendant would not be allowed to live with them if he was granted an alternative sentence.

The Defendant testified at his sentencing hearing. According to the Defendant, he began to consume alcohol at age seventeen, tried marijuana at age nineteen, and experimented with other drugs, eventually developing a habit of using cocaine once every two weeks. The Defendant recalled he was adjudicated a "juvenile delinquent" for running away from home, "being unruly," and committing several acts of vandalism.

The Defendant obtained his G.E.D., and he enlisted in the National Guard. He estimated he served in the National Guard for three-and-a-half years until he was forced to resign due to the terms of the probation sentence he was serving at the time, which prohibited him from carrying a firearm.

The Defendant explained that he committed the offenses in this case against the people with whom he came into contact while he used drugs. He recalled that he stole unattended credit cards and other items of value from these acquaintances in order to fund his drug habit. The Defendant testified that he originally told the probation officer who interviewed him in connection with his previous Blount County convictions that he was not addicted to drugs and did not need drug treatment. The Defendant testified, however, that he did have a drug problem at the time. He explained he lied about his drug addiction to avoid being discharged from the National Guard. While on probation, the Defendant lived with his grandparents and worked various construction and food industry jobs. He testified that he never stopped using drugs while on probation and that he never paid his court-ordered fees. His drug use gradually increased, and he began stealing credit cards from his acquaintances in order to fund his drug use until he was arrested in April 2008 for this behavior. While he was in jail between his April 2008 arrest and the December 5 hearing, the Defendant was involved in an altercation with another inmate, for which the Defendant was placed in "lockdown" for a week.

The Defendant insisted that his drug addiction was real and severe, attributing his previous denial of drug use to his fear of being ejected from the National Guard. He asked the trial court to allow him to try to "fix everything on [his] own" and order drug treatment rather than require him

to serve his sentence in confinement. He testified that he would attend school if he received an alternative sentence.

On cross-examination, the Defendant recalled that he was placed on probation as a juvenile when he was fourteen years old but, as a result of various violations, was committed to the Department of Children's Services and placed in a group home. After he assaulted someone in the group home, he was assigned to Taft Youth Development Center, a maximum security juvenile facility. The Defendant "graduated" from Taft after seven months and was allowed to "step down" to a group home, where he lived until he turned eighteen.

After he was released from DCS custody in 2003, the Defendant soon committed several crimes, including assault and vandalism. In 2005, the Defendant committed a string of traffic offenses and pled guilty to cocaine possession. The Defendant testified that he was using hydrocodone, oxycontin, alcohol, and cocaine up until the time of his arrest in this case.

The Defendant again expressed his wish to complete his sentence in a halfway house, but he acknowledged that the jail altercation that resulted in a "lockdown" disqualified him from Blount County Drug Court. Also, he acknowledged that, while serving previous probated sentences, he had also committed crimes, although his probated sentences were never revoked.

The Defendant acknowledged he was involved in a second altercation in jail that he did not mention on direct examination, but he explained he was not forced into "lockdown" as a result of this altercation. He confirmed that the victims of the forgeries underlying his previous probated sentence included several acquaintances, his grandmother, and Emily Boldick. The Defendant acknowledged Boldick was the mother of his two-year-old daughter and that he violated an order of protection she obtained before he was arrested in April 2008.

At the conclusion of the hearing, the trial court accepted the parties' agreed sentence of four years for the Defendant's May 2008 charges, and it ordered the Defendant to serve the four-year sentence in confinement, consecutively to the remainder of his three-year sentence. The trial court entered a written order reflecting this ruling. It is from the trial court's order imposing confinement for the May 2008 charges that the Defendant now appeals.

## **II. Analysis**

The Defendant contends the trial court erred when it denied alternative sentencing, arguing his cooperation and drug addiction warrant a split sentence of confinement followed by a period of supervised release during which the Defendant could obtain treatment for his drug addiction. He argues that such a period of supervised release would do more to prevent his future criminal conduct than would a term of total confinement. The State responds that the trial court properly denied alternative sentencing based on the Defendant's lengthy criminal history, the Defendant's past failure to comply with measures less restrictive than confinement, and the Defendant's lack of amenability to rehabilitation.

When a defendant challenges the length, range or manner of service of a sentence, this Court

must conduct a de novo review on the record with a presumption that “the determinations made by the court from which the appeal is taken are correct.” T.C.A. § 40-35-401(d); *State v. Mencer*, 798 S.W.2d 543, 549 (Tenn. Crim. App. 1990) (finding community corrections to be a form of alternative sentencing and therefore holding the de novo standard of review of T.C.A. § 40-35-402(d) to apply to community corrections). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, T.C.A. section 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001).

Due to the 2005 sentencing amendments, a defendant is no longer presumed to be a favorable candidate for alternative sentencing. *State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008) (citing T.C.A. § 40-35-102(6) (2006)). Instead, a defendant not within “the parameters of subdivision (5) [of T.C.A. § 40-35-102], and who is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.” *Id.* (footnote omitted). T.C.A. § 40-35-102(6); 2007 Tenn. Pub. Acts 512. Additionally, we note that a trial court is “not bound” by the advisory sentencing guidelines; rather, it “shall consider” them. T.C.A. § 40-35-102(6) (emphasis added).

A defendant seeking probation bears the burden of “establishing [his] suitability.” T.C.A. § 40-35-303(b) (2006). As the Sentencing Commission points out, “even though probation must be automatically considered as a sentencing option for eligible defendants, the defendant is not automatically entitled to probation as a matter of law.” T.C.A. § 40-35-303 (2006), Sentencing Comm'n Cmts.

When sentencing the defendant to confinement, a trial court should consider whether:

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

T.C.A. § 40-35-103(A)-(C) (2006). In choosing among possible sentencing alternatives, the trial court should also consider “[t]he potential or lack of potential for the rehabilitation or treatment.” T.C.A. § 40-35-103(5); *State v. Dowdy*, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). The trial court may consider a defendant's untruthfulness and lack of candor as they relate to the potential for rehabilitation. *See State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); *see also State v.*

*Bunch*, 646 S.W.2d 158, 160-61 (Tenn. 1983); *State v. Zeolia*, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996); *State v. Williamson*, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995); *Dowdy*, 894 S.W.2d at 305-06.

In this case, the trial court sentenced the Defendant to the agreed-upon sentence of four years at thirty percent, and it denied the Defendant's request for an alternative sentence, requiring the Defendant to serve his entire sentence in confinement. The trial court explained its consideration of sentencing principles that led to its denial of alternative sentencing:

The Court finds that by his own admission he was using drugs while he was on probation. This offense was committed while he was on probation. The Court finds that he has a lengthy history of not only felony convictions, but misdemeanor convictions. Measures less restrictive than confinement have been applied to the Defendant unsuccessfully. And, finally, his lack of candor, his long history of criminal convictions, his behavior in jail while awaiting disposition of these charges leads the Court to the inescapable conclusion that his amenability to the rehabilitation process is as dubious. And therefore all relief is denied, and he will be ordered to serve his sentence.

The Defendant is a standard offender, and his convictions range from Class E misdemeanors to Class D felonies. Therefore, the Defendant is a "favorable candidate" for alternative sentencing. *See Carter*, 254 S.W.3d at 347. The trial court based its denial of alternative sentencing on the Defendant's long history of criminal conduct, the past failures of measures less restrictive than confinement, and the Defendant's lack of amenability to rehabilitation. Indeed, the Defendant admitted to extensive illicit drug use, and he has a long history of criminal conduct, which includes several violent acts. Also, the Defendant committed the crimes in this case while on probation. Finally, the Defendant has persistently used drugs and stolen to support his drug use, despite serving sentences for theft and drug possession convictions. The record, therefore, adequately supports the trial court's findings. *Ross*, 49 S.W.3d at 847. We conclude, therefore, that the trial court considered the pertinent facts of this case and the sentencing principles of Tennessee Code Annotated section 40-35-103(A)-(C). As such, its denial of alternative sentencing is presumptively correct. *See T.C.A. § 40-35-401(d); Mencer*, 798 S.W.2d at 549.

The Defendant has failed to carry his burden of proving his suitability for probation. T.C.A. § 40-35-303(b) (2006). We conclude that the Defendant's lengthy history of criminal conduct, his past failures to comply with measures less restrictive than confinement, and his lack of rehabilitative potential require his confinement in this case. *See T.C.A. § 40-35-103(1), (5); Kendrick*, 10 S.W.3d at 656; *Dowdy*, 894 S.W.2d at 305. The Defendant is not entitled to relief on this issue.

### **III. Conclusion**

After a thorough review of the record and relevant authorities, we conclude that the trial court properly denied alternative sentencing. As such, we affirm the trial court's judgment.

